



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Case 95 of 2005**

**JOSEPH SITATI**

**NATO.....PLAINTIFF**

**VERSUS**

**KENYA PORTS**

**AUTHORITY.....DEFENDANT**

**RULING**

Before court is the Notice of Motion application dated 10<sup>th</sup> November 2011 by which the Plaintiff/Applicant seeks the following orders:-

- “ 1) THAT certain parts in the Judgement delivered on the 22<sup>nd</sup> of February 2010 by lady Justice Odero and the order granted therein be reviewed and the Applicant be awarded a further sum of Kshs 2,744,514/00 as against the Respondent/Defendant.**
- 2) *THAT costs of this application be provided for***
- 3) *Interest on [1] above at court rates”***

The application was supported by the affidavit of the Plaintiff **JOSEPH SITATI NATO**. The Defendant/Respondent opposed the application by way of a Replying Affidavit sworn by **MICHAEL O. SANGORO** filed on 12<sup>th</sup> March 2012. By consent the application was disposed of by way of written submissions.

The basis for this application is the judgement dated 22<sup>nd</sup> February 2010 which I delivered in respect of the plaint filed by the Plaintiff/Applicant on 27<sup>th</sup> May 2005. In that judgement I found in favour of the Plaintiff and entered judgement in his favour against the Defendant/Respondent in the sum of **Kshs.3,049,544/-**.

This present application as supported by the affidavit of **JOSEPH SITATI NATO** was based on 8 grounds which can be condensed into two main grounds as follows:

- 1) THAT there was a mistake, error, or omission apparent on the face of the court record when the court stated that the Plaintiff/Applicant was dismissed at the age of 47 years while in actual fact the Plaintiff’s correct age at the time of dismissal was 43 years.**
- 2) THAT at the time of dismissal, the Plaintiff was earning **Kshs.45,920** and not **Kshs.35,690/-** which**

was used by the court to tabulate the general damages.

The Plaintiff therefore prays that this error apparent on the face of the record be corrected, the general damages be recomputed and that he be awarded an additional **Kshs.2,744,514/00**

As stated earlier the application was opposed. The grounds of opposition may be summarised as follows:

- 1) **THAT** the age of the Applicant at the time of his dismissal can be discerned from the pleadings and the evidence adduced during the trial.
- 2) **THAT** by his own evidence the Plaintiff put his earnings at Kshs.35,690/-
- 3) **THAT** the Plaintiff/Applicant is bound by his own pleadings
- 4) **THAT** the application as filed is tantamount to seeking that this court sit in appeal on its own decision.
- 5) **THAT** no new facts have emerged to change the circumstances of the matter.
- 6) **THAT** there has been unreasonable delay in bringing this application.

I have carefully considered this application as well as the grounds of opposition thereto. I find that there exists one main issue for determination. That is whether the errors pointed out by the Plaintiff/Applicant are indeed errors apparent on the face of the record and therefore warrant a review of the court's judgement.

Whilst there could be no clearcut definition of an error apparent on the face of the record, each case must be considered and determined on its own circumstances. The Court of Appeal made an attempt to define an error apparent on the face of the record in the case of **NYAMOGO and NYAMOGO ADVOCATES –VS- KAGO [2001]1 E.A. 173**. In that case their Lordships stated as follows:-

***“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out”***

Thus such an error should be self evident, requiring no elaborate arguments to establish.

On the question of the Plaintiff's age having perused the court record I note that when he gave evidence the Plaintiff under cross-examination, testified that he was aged 47 years. This means that on 26<sup>th</sup> June 2009 the date when the Plaintiff gave his evidence he was 47 years old. This statement was neither contradicted nor contested by the Defendant in any way. Therefore by any logical deduction this would put the Plaintiff's age at the time of his dismissal on 10<sup>th</sup> February 2004 [five (5) years earlier] at 43. This I find to be clearly an error on the face of the record which does not need any belabouring. The error does not affect the merit of the court's findings and my finding that the Plaintiff was entitled to be paid damages from the date of his dismissal remains unchallenged. The Plaintiff's expected emoluments ought to have been computed from the date of his dismissal and not from the date of his testimony in court. This is an error which is self-evident and which in my view is subject to review. As such the Plaintiff's age as at the time of his dismissal should read 43 years **instead of** 47 years. Accordingly the Plaintiff had a further **12 years** [and not 8 years as indicated in my judgment] to work before he attained the compulsory retirement age of 55 years. Thus the new computation of the Plaintiff's damages would be assessed as follows:

Kshs.35,960/- per month for twelve (12) years which comes to Kshs.5,139,360/-. That sum discounted by

15% brings the figure down to Kshs.4,368,456/-. This new figure is in excess by **Kshs.1,456,152/-**

With respect to the salary due to the Plaintiff counsels submissions were that the Plaintiff was earning a sum of Kshs.42,920 at the time of his dismissal **and not** the sum of Kshs.35,690/- which was used to compute general damages. In his evidence in chief the Plaintiff told the court that his salary at the time of his dismissal was Kshs.35,690/-. These were his own words. The salary advice slip produced by the Plaintiff himself in support of his evidence showed that his salary for the month of February 2004 was Kshs.34,770/-. No evidence was tabled before the court at all to suggest much less prove that the Plaintiff was earning this sum of Kshs.45,920/- neither did the Plaintiff mention this higher figure in his evidence. The court only relied on what the Plaintiff himself told it. If the Plaintiff now wishes to alter his evidence then that is a totally different ball game. He must adduce fresh evidence to prove this new salary he now claims. There cannot be said to have been any error at all. If the Plaintiff wished to pursue this line when he must bring it up as a matter for appeal. On the question of salary earned at the time of his dismissal I find that the correct figure as given by the Plaintiff himself was Kshs.35,690/- and no error on the face of the record exists on this aspect.

Finally I will consider the delay alluded to in the Defendant's submissions in bringing this present application for review. Judgement was read on 22<sup>nd</sup> January 2010 yet this application was filed on 10<sup>th</sup> November 2011 a full 1 year and 10 months later. No explanation has been given for this delay. I have no doubt that these errors were well within the Applicant's knowledge from the time the court delivered his judgment. This delay is certainly unreasonable. However I do appreciate the fact that the error was occasioned by the court itself. As such I will proceed to award the Plaintiff this additional sum of **Kshs.1,456,152/-** However due to the delay in bringing this application I decline to award him costs and interest thereon.

It is so ordered.

**Dated and Delivered in Mombasa this 27<sup>th</sup> day of July 2012.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Oguk for Plaintiff/Applicant

Mr. Wafula for Defendant/Respondent